

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-923**

LYNN JORDAN and GERALD W. HYLAND,
Appellants,

v.

MILLS E. GODWIN, Governor of the
Commonwealth of Virginia, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No.

LYNN JORDAN and GERALD W. HYLAND,
Appellants,

v.

MILLS E. GODWIN, Governor of the
Commonwealth of Virginia, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

This appeal raises the novel question of whether a state may, consistent with the First and Fourteenth Amendments, greatly restrict eligibility for public office by flatly prohibiting any and all citizens other than certain optometrists from being eligible for appointment to the state board that regulates optometrists.

By upholding this prohibition without even mentioning this Court's decision in *Turner v. Fouche*, 396 U.S. 346 (1970), without applying "strict scrutiny" to this restriction on qualification for public office, and without even bothering to identify a state interest supporting such a broad exclusion, the court below departed completely from this Court's recent precedents regarding state restrictions upon eligibility for public office.

OPINION BELOW

The opinion of the District Court has not yet been officially reported. It is set forth at pages 2a-12a of the Appendix to this Jurisdictional Statement (hereinafter "App.>").

JURISDICTION

This action challenges the constitutionality of Virginia Code § 54-375 on the ground that it violates plaintiffs-appellants' First Amendment rights to be eligible for public office, and their Fourteenth Amendment rights to equal protection of the laws and due process of law. A three-judge court was convened pursuant to 28 U.S.C. § 2281, and rendered a judgment and opinion on the merits in favor of defendants-appellees on September 8, 1976. App. 1a-12a. A notice of appeal was filed in the District Court on December 3, 1976. App. 13a.¹ This Court has jurisdiction over the appeal under 28 U.S.C. § 1253.

¹ By order dated December 3, 1976, the District Court granted plaintiffs' motion for an extension of time to file their notice of appeal, based on counsel's excusable failure to learn of the entry of judgment. See, Rule 4(a), F.R.A.P.

STATUTE INVOLVED

The statute challenged by plaintiffs-appellants, § 54-375 of the Virginia Code, Repl. Vol. 1974, provides in pertinent part:

The members of the Board shall possess sufficient knowledge of theoretical and practical optometry to practice optometry and shall have been residents of this State duly licensed as optometrists and actually engaged in the practice of optometry within the meaning of this chapter for at least five years preceding the date of their appointment.

QUESTION PRESENTED

Does Va. Code § 54-375, which flatly prohibits anyone but certain optometrists from being eligible for appointment to the state board that regulates optometrists, deprive plaintiffs of their First and Fourteenth Amendment rights to be eligible for appointment to public office without being arbitrarily excluded from such eligibility?

STATEMENTS OF THE CASE

A. Facts

All facts were undisputed and were found by the District Court in its opinion. App. 2a.

Plaintiffs-appellants are two residents of Virginia who are interested and experienced in the representation of consumer interests in the regulation of professional services. Each wishes to be eligible for appointment to and

service upon the Virginia State Board of Examiners in Optometry (hereinafter "the Board"), in order to participate directly in an official capacity in their State government and engage in service to and advancement of the interests of consumers of optometric products and services in Virginia. App. 2a.

The Board, as a public agency established under Virginia law, is empowered to carry on a number of activities, including licensing optometrists, issuing regulations prescribing how licensed optometrists may or may not conduct themselves in their dealings with consumers of eyeglasses and other optometric products and services, imposing continuing education requirements, processing and investigating consumer complaints against optometrists, educating the public concerning optometric products and services, regulating the form, content and manner of advertising of the price of eyeglasses and other optometric products and services, and disciplining optometrists. App. 3a.

Membership on the Board, however, is restricted by statute to certain licensed optometrists. Under Va. Code § 54-371, the Governor appoints all members of the Board, each of whom is required by § 54-375 (the challenged provision) to be a licensed optometrist who has practiced optometry for five years preceding appointment. Section 54-375 therefore has the direct effect of denying all other Virginians (including appellants) eligibility for appointment regardless of their qualifications. Also excluded from consideration are persons specifically trained to perform some or all optometric functions, such as ophthalmologists, opticians, unlicensed optometrists, and licensed optometrists with less than five years of practice. It would, of course, have been futile for appellants to apply to the Governor

for possible appointment to the Board for he would have been obliged to consider them ineligible, regardless of their qualifications. App. 4a.

B. Proceedings In the District Court

Appellants filed this action on May 17, 1976 in the United States District Court for the Eastern District of Virginia seeking injunctive and declaratory relief against defendants-appellees (the Governor and the members of the Board) insofar as § 54-375 excludes appellants and all other Virginia citizens other than certain licensed optometrists from being eligible for appointment to the Board.

Appellants alleged that the statutory exclusion deprives appellants of their First Amendment rights to seek public office and thereby participate directly in their government; that this exclusion creates a statutory classification that lacks any rational basis and serves no legitimate or compelling state interest, in violation of the Equal Protection Clause; and that § 54-375 creates an arbitrarily conclusive, irrebuttable presumption that no one but a licensed optometrist is qualified to serve on the Board and protect the public welfare, in violation of the Due Process Clause. Violations of 42 U.S.C. § 1983 were also alleged. Complaint ¶¶ 9-11.

The complaint requested very limited injunctive relief of the District Court: to enjoin the operation of § 54-375 by prohibiting the appellee Governor from limiting consideration of appointments to the Board to persons who are licensed optometrists, declaring the Board positions vacant, and requiring him to make appointments to all positions on the Board without limiting consideration to optometrists. The complaint also requested declaratory relief and

the convening of a three-judge court. On May 25, 1976, Chief Judge Haynesworth of the Fourth Circuit convened such a court consisting of Circuit Judge Butzner and District Judges Bryan and Warriner.

Plaintiffs adduced expert testimony to the following effects: that in many other states, there are lay (or "public") members on state professional licensing and regulatory boards, including boards regulating law, medicine and other technically complex professions; that at least eight states include non-optometrists on their boards which regulate optometrists; that public membership on these boards has been quite successful in terms of assuring competence and providing a valuable perspective lacking in members of the profession being regulated; that there is no research or evidence to support the view that lay persons are not fully competent to serve on such boards; and that there is evidence that the absence of lay members on such boards contributes to anti-competitive, anti-consumer behavior by such boards.² Appellees accepted these facts, and introduced no evidence of their own.³ The District Court also did not question these facts. App. 4a.

Appellants moved for summary judgment, appellees opposed the motion, and after full briefing, the case was tried on undisputed facts before the three-judge court on July 20, 1976. The Federal Trade Commission's Bureau of Consumer Protection filed a brief *amicus curiae* in support of appellants' position, pointing out that the Board

² See, affidavits filed in support of Plaintiffs' Motion for Summary Judgment.

³ See, Plaintiffs' Statement of Material Facts Not in Genuine Dispute, ¶ 9, explicitly adopted by Defendants-Appellees in their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, at p. 1.

had adopted numerous anti-competitive regulations which had increased consumer prices for vision care products and services and posed a potential public health problem.

In response to a question from the court, counsel for appellees, by letter dated July 28, 1976, informed the court that the Virginia Optometric Association is the only professional organization of practicing optometrists in Virginia, that the Association has always selected three nominees for the Board from the Association's own membership and submitted those names to the Governor pursuant to Virginia Code § 54-372, and that the Governor "almost always" fills Board positions from the Association's list. On August 19, 1976, appellants filed a supplemental memorandum advising the court of the decision of the three-judge court in *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976), appeal pending No. 76-808 (U.S. Sup. Ct.), striking down on equal protection grounds a New York statute excluding from employment as public school teachers all non-citizens who had not sought naturalization.

C. The Decision of the District Court

On September 8, 1976, the District Court filed its Order and Opinion finding for the defendants on the merits.

Plaintiffs had principally argued (a) that *Turner v. Fouche*, *supra* and other cases had recognized (in this Court's words) "a federal constitutional right to be considered for public service" (there, an appointed school board) without being excluded from eligibility by classifications (there, a freeholder requirement) which could not pass muster under the Equal Protection Clause, 396 U.S. at 362-63, and (b) that *Turner* had required that even a non-suspect classification not af-

fecting a fundamental interest must, in the case of such a limitation on eligibility for public office, be "finely tailored to achieve the desired goals." *Id.* at 364.

Plaintiffs had cited several cases to support their contention that the right to seek public office was a form of political expression, a "fundamental" First Amendment right triggering "strict scrutiny" (*see, infra*, n. 6), and had argued that in any event, § 54-375 could not meet even a "rational relationship" test, much less the "finely tailored" test applied in *Turner v. Fouche* and elaborated in numerous Supreme Court equal protection holdings such as *Reed v. Reed*, 404 U.S. 71 (1971) and *Stanley v. Illinois*, 405 U.S. 645 (1972). Finally, plaintiffs had contended that § 54-375 created a constitutionally impermissible conclusive presumption far more arbitrary, restrictive and unnecessary than that upheld in *Weinberger v. Salfi*, 422 U.S. 749 (1975).

The District Court's opinion completely ignored plaintiffs' most important contentions and cases. It proceeded to an equal protection "analysis" without even mentioning *Turner v. Fouche* and the other cases principally relied on by plaintiffs and factually closest to the instant case. Acknowledging that the interest in running for public office is protected by the First Amendment and triggers a "strict scrutiny" standard, the District Court simply asserted that "[a]s the case at bar does not involve running for public office but instead eligibility for appointment to a State Board, the Court does not agree that a fundamental interest is involved. Thus, strict scrutiny is not triggered." App. 8a.

The District Court then stated that Virginia had "a legitimate interest in the regulation of optometrists," and that Virginia "has chosen to exclude non-optometrists from the

Board." App. 8a-9a. Without identifying *any* purpose served by the statutory exclusion, without *any* effort to evaluate the rationality of the relationship between means and end, and without *any* reference to the undisputed facts demonstrating that § 54-375 actually *subverts* Virginia's declared public policy in favor of citizen membership on such boards, the court found "a rational basis for this policy." App. 9a. The court wholly ignored the "finely tailored" test, and the cases construing that test. It also wholly ignored plaintiffs' argument that since only *eligibility* for the Board was at issue, Virginia's concern for regulating occupations in the public interest⁴ could only be *strengthened* by enlarging the pool of eligibles.

With respect to plaintiffs' irrebuttable presumption argument, the district court simply relied on the *Salfi* case, asserting that this Court had "limited the irrebuttable presumption doctrine to those cases involving suspect classifications or fundamental rights." App. 7a. The district court did not address plaintiffs' contention that in *Salfi*, this Court had sustained a broad presumption which was necessary (in this Court's words) "to obviate the necessity of large number of individualized determinations" (422 U.S. at 782), a situation wholly unlike the instant case.

Finally and most ironically, the argument addressed at greatest length by the district court — substantive due process — was an argument that, as the court readily acknowledged, "plaintiffs did not raise." App. 10a.

⁴ By statute, it is "the policy of the Commonwealth of Virginia that no regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest." Virginia Code § 54-1.3.

THE QUESTION PRESENTED IS SUBSTANTIAL
AND REQUIRES PLENARY CONSIDERATION BY
THIS COURT.

Appellants wish to be eligible for appointment to certain state offices in Virginia which have an important impact on the welfare of consumers, whom appellants seek to represent in the regulatory process. These are offices on which lay persons such as appellants serve successfully in a number of other states. App. 8a. Yet Virginia, without articulating any state interest in drastically limiting the pool of citizens from which the Governor may select such public officials, has flatly barred appellants (and others, including many trained optometrists) from being eligible for these offices.

Such a broad, arbitrary restriction on citizens' opportunities to hold public office — on the sole basis that they are not members of the regulated group (in this case, optometrists) — raises an increasingly important question under the First and Fourteenth Amendments that has never been directly considered by this Court: Is a citizen's right to seek public appointive office a "fundamental right" (as this Court has described the right to seek elective office) deprivation of which requires "strict scrutiny"? However that novel question is answered, this case also poses a further issue: Can a state deprive citizens of that right *without advancing any interest whatsoever*?

There are a number of reasons why these issues are substantial ones requiring plenary consideration by this Court.

First, the instant case squarely presents the issue explicitly deferred by this Court in *Turner v. Fouche* — the precise degree of judicial scrutiny to which such a limitation on eligibility for public office should be subjected. 396 U.S. at 362.

Second, growing public concern about the anti-competitive effects of much self-regulation by occupational groups has caused many consumer-oriented citizens such as appellants to seek appointment to such regulatory boards as a way of influencing public policy.⁵ Any constitutional distinction between the right to seek appointive and elective office would have important ramifications for the political opportunity available to electorally diffuse but nevertheless socially significant interests, such as those of consumers.

Third, statutory requirements that state regulatory officials must be members of the regulated group are common not only in Virginia but in a number of other states as well.

Fourth, such a requirement not only abridges the First Amendment rights of large numbers — indeed, the vast majority — of citizens but, by ensuring regulation solely by the regulated group itself, calls into serious question the integrity of the regulatory process as a means of "protecting the public interest." See, *supra*, n. 4. Indeed, this Court has increasingly been obliged to remedy the pernicious effects of such closed regulatory systems in recent years. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, ___ U.S. ___, 96 S. Ct. 1817 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

Finally, this Court has repeatedly held in recent years that statutes whose effect is to narrow participation in

⁵ See, affidavits submitted in support of Plaintiffs' Motion for Summary Judgment.

the legal-political process on arbitrary grounds cannot stand. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign spending); *Turner v. Fouche*, *supra* (appointment to school board); *Reed v. Reed*, *supra* (appointment to administer estate). Section 54-375 is such a statute.

A. The District Court Wholly Ignored This Court's Decision In *Turner v. Fouche*.

This Court's unanimous 1970 decision in *Turner v. Fouche*, *supra* established that there is a federal constitutional right to be eligible for appointment to public office (in that case, an appointed local school board) without being excluded by an arbitrary classification (in that case, a requirement that all members be freeholders). In *Turner v. Fouche*, the Court found it unnecessary to decide whether the "strict scrutiny," "rational relation," or some intermediate test should be applied to the freeholder requirement, since the statute could not even pass muster under the "rational relation" test, nor was it "finely tailored to achieve the desired goals." 396 U.S. at 364.

Relying on *Turner v. Fouche*, lower courts have struck down as irrational and over-broad similar limitations on eligibility for appointive office without resolving the degree-of-scrutiny question. E.g., *Taggart v. Mandel*, 391 F. Supp. 732, 739 (D. Md. 1975) (three-judge court) (statutory requirement that appointee to state office of notary public be United States citizen).

Despite plaintiffs' extensive discussion of *Turner v. Fouche* and its progeny in their briefs below, however, *neither defendants in their brief nor the district court in its opinion so much as mentioned the case*, much less distinguished it.

B. The Critical Degree-of-Scrutiny Issue Expressly Deferred By This Court In *Turner v. Fouche* Has Never Been Resolved.

As noted above, this Court in *Turner v. Fouche* expressly declined to reach the question of which standard of scrutiny should apply to a restriction on eligibility for public office, finding it "unnecessary to resolve the dispute." 396 U.S. at 362. With the decision below, the lower courts are now divided on this question. The case at bar squarely presents the Court with the opportunity to resolve it.

This Court has required "exacting examination" and a "compelling state interest" before a state may restrict "who may participate in political affairs." *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-27 (1969). While *Kramer* involved the question of voting rights, the Court's rationale is equally applicable to a case such as this challenging exclusion from a public decision-making body:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments (citation omitted) are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

See also, *Lubin v. Parish*, 415 U.S. 709, 716 (1974) (applying strict scrutiny to restrictions on a candidate's "equally important interest in the continued availability of political opportunity").

Many lower courts have applied the "strict scrutiny" standard to statutory qualifications for public office, and this Court has summarily affirmed several of these decisions.⁶ This Court implied in *Kramer* that the applicability of the "strict scrutiny" standard would not be affected simply because the offices in question might have been appointive rather than elective, *id.* at 628-29. Indeed, "strict scrutiny" has been applied by at least one lower court to overturn restrictions on eligibility for *appointive* office.⁷

Despite plaintiffs' extensive discussion of these cases in their briefs below, however, the district court completely ignored them, except to assert the following distinction of *Mancuso v. Taft*, *supra*:⁸

⁶ *E.g.*, *Henderson v. Fort Worth Independent School Dist.*, 526 F.2d 286, 292 (5th Cir. 1976) and cases there cited; *Wellford v. Battaglia*, 485 F.2d 1151, 1152 (3rd Cir. 1973); *Mancuso v. Taft*, 476 F.2d 187, 195 (1st Cir. 1973); *Duncantell v. City of Houston, Texas*, 333 F. Supp. 973, 975, 976 (S.D. Tex. 1971) (three-judge court).

⁷ *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972) (three-judge court) ("strict scrutiny" applied to durational citizenship requirement for appointment as foreign service officer, even though statute imposed only delay rather than total disqualification). An intermediate "substantial relation" test has also been applied to qualifications for public appointments. *E.g.*, *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (invalidating statute giving males preference in court appointments to administer estates); *Eslinger v. Thomas*, 476 F.2d 225, 231-32 (4th Cir. 1973) (invalidating statute prohibiting appointment of women as pages in state legislature).

⁸ Defendant has also completely ignored these cases, including *Mancuso v. Taft*.

As the case at bar does not involve running for public office but instead eligibility for appointment to a State Board, the Court does not agree that a fundamental interest is involved. Thus, strict scrutiny is not triggered.

App. 8a. The district court did not bother to explain why that distinction should make a constitutional difference and cited no cases to support its conclusion. Since the lower courts are now divided on this issue, this Court should resolve the question.

C. The District Court Applied the "Minimum Rationality" Test Without Even Indicating What State Interest Is Served By § 54-375, Much Less Identifying A Rational Relationship Between Them.

In applying the "minimum rationality" test, the district court not only wholly ignored *Turner v. Fouche*, *supra*, *Reed v. Reed*, *supra*, *Stanley v. Illinois*, *supra*, and the other factually analogous cases strongly supporting plaintiffs' position; *it also wholly failed to explain what interest § 54-375 is supposed to serve*. And having failed to identify the statutory purpose, the court could not and did not explain how, if at all, § 54-375 served that purpose. Its entire analysis was as follows (App. 4a):

The Commonwealth has a legitimate governmental interest in the regulation of optometrists and, in furtherance of this interest, has chosen to exclude non-optometrists from the Board.

However, this assertion (with which no one could possibly disagree) simply describes the provisions of § 54-375; *it does not address the central question of how Virginia's interest in regulating optometrists is advanced in any way*

by excluding appellants and most other Virginians from eligibility for the Board.⁹ Nor did the court bother to refute plaintiffs' uncontradicted showings (a) that § 54-375 in fact *subverts* Virginia's interest in regulating optometrists in the public interest, and (b) that Virginia has recently *required* that persons such as appellants be not merely eligible for appointment to new occupational regulatory boards but actually be *appointed* to such boards.¹⁰

There must come a point at which "minimal scrutiny" becomes non-scrutiny and abdication of the judicial function. The district court opinion goes well beyond that point.

⁹ Defendant below had also failed to identify any state interest underlying the statutory exclusion, a failure that plaintiffs had stressed to the court. See, Pl. Reply Mem., pp. 4-5.

¹⁰ Va. Code § 54-1.9.

CONCLUSION

Virginia Code § 54-375 deprives appellants of their fundamental rights to be eligible to seek public office, rights recognized by this Court in a number of its recent decisions, and it does so without furthering *any* identifiable state interest. The issue in this case is of substantial and growing public importance, as reflected in recent decisions of this Court insisting on open channels of political opportunity and participation for diffuse interests, and reversing anti-competitive and otherwise illegal activities engaged in by regulatory boards composed entirely of the regulated. Finally, this case presents this Court with the opportunity to address the question explicitly deferred in *Turner v. Fouche* — the degree of constitutional protection to be afforded the right to seek appointment to public office.

Respectfully submitted,

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APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

| | | |
|----------------------------|---|---|
| LYNN JORDAN, <i>et al.</i> | : | FILED SEP. 8, 1976 |
| | : | CLERK, U.S. DISTRICT COURT ALEXANDRIA, VIRGINIA |
| v. | : | CIVIL ACTION No.: 76-382-A |
| | : | |

MILLS E. GODWIN, *et al.* :

ORDER

For the reasons set forth in the accompanying Opinion it is ADJUDGED and ORDERED that plaintiffs are denied the relief sought herein and the Court finds for the defendants on the merits. Defendants may recover their costs.

Let the Clerk send a copy of this order and the accompanying opinion to all counsel of record.

/s/ John D. Butzner, Jr.
UNITED STATES DISTRICT JUDGE

/s/ Fr. Bryan, J.
UNITED STATES DISTRICT JUDGE

/s/ D. D. Warriner
UNITED STATES DISTRICT JUDGE

Date: September 8th, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FILED
SEP. 8, 1976

CLERK,
U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

LYNN JORDAN, *et al.* :

v. :

MILLS E. GODWIN, *et al.* :

CIVIL ACTION
No.: 76-382-A

OPINION

WARRINER, District Judge:

This suit is an action for declaratory and other appropriate relief as authorized by 28 U.S.C. §§ 2201 and 2202. Specifically, the plaintiffs are seeking a declaration that § 54-375 of the Virginia Code,¹ dealing with the Board of Examiners in Optometry, is unconstitutional. Plaintiffs contend the challenged statute denies them their constitutional rights under the First and Fourteenth Amendments insofar as said statute excludes them and other citizens of Virginia who are not licensed optometrists from eligibility for appointment to the Virginia State Board of Examiners in Optometry [the Board].

¹ The members of the Board shall possess sufficient knowledge of theoretical and practical optometry to practice optometry and shall have been residents of this State duly licensed as optometrists and actually engaged in the practice of optometry within the meaning of this chapter for at least five years preceding the date of their appointment. Va. Code Ann. § 54-375 (Repl. Vol. 1974).

The Court has reservations regarding the issue of standing in light of *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974) and *Ex Parte Levitt*, 302 U.S. 633 (1937). In view of the disposition made of the case this issue need not be resolved. Jurisdiction is accepted under 28 U.S.C. § 1343(3).

The facts in this case are simple and not in dispute. Plaintiffs are residents of Virginia and are interested in the representation of consumer interests in the regulation of professional services. Each of the plaintiffs wishes to be eligible for appointment to, and for service upon, the Board. As members of the Board they would be able to participate directly in an official capacity in their State government and engage in service to and advancement of the interests of consumers of optometric products and services in Virginia.

The Board is a public agency established under Virginia law. It is empowered to carry on a number of activities, including the licensure of optometrists, the issuance of regulations prescribing how licensed optometrists may or may not conduct themselves in their dealings with consumers of eyeglasses and other optometric products and services, the imposition of continuing education requirements, the processing and investigation of consumer complaints against optometrists, education of the public concerning optometric products and services, regulating the form, content and manner of advertising of the price of eyeglasses and other optometric products and services, and the discipline of optometrists.

Membership on the Board, however, is restricted to licensed optometrists. Under § 54-371 of the Virginia Code, the Governor of the Commonwealth is authorized to appoint

the members. Section 54-375 therefore has the direct effect of denying the Governor the opportunity to consider for appointment plaintiffs and any other citizen of Virginia, despite alternative qualifications, who are not licensed optometrists. Also excluded from consideration are persons who are specifically trained to perform some or all optometric functions, such as ophthalmologists, opticians, unlicensed optometrists, and licensed optometrists with less than five years of practice. It would, of course, be futile for plaintiffs to apply to the Governor for appointment to the Board for he would be obliged to consider them ineligible, regardless of their qualifications.

To set aside the legal disability imposed upon plaintiffs by § 54-375, plaintiffs commenced this action for declaratory relief.

I

Plaintiffs argue that § 54-375 of the Virginia Code has created a conclusive, irrebuttable presumption that no one but licensed optometrists are competent to serve on the Board and, consequently, the statute deprives plaintiffs' liberty and property without due process of law. In support of their argument, plaintiffs direct the Court's attention to a recent line of Supreme Court cases² which held that irrebuttable presumptions which are arbitrary and irrational violate the due process rights of those excluded by such presumptions.

Stanley v. Illinois, 405 U.S. 645 (1972), struck down an irrebuttable statutory presumption that unmarried fathers are incompetent to raise their children and *Cleveland Board*

² E.g., *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972).

of *Education v. La Fleur*, 414 U.S. 632 (1974), struck down an irrebuttable regulatory presumption that women who are five months pregnant thereby become unfit to work as public school teachers.

The Court notes, however, that both *Stanley* and *La Fleur* have been distinguished by the Supreme Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975).³ In *Salfi*, the district court had relied on *Stanley*, *La Fleur* and *Vlandis v. Kline*, 412 U.S. 441 (1973), in finding that Section 416 of the Social Security Act had created an irrebuttable presumption that all short-lived marriages were shams for the purpose of obtaining Social Security payments.⁴

Plaintiff Salfi and her daughter had applied for Social Security insurance benefits upon the death of Salfi's husband (the daughter's stepfather) of less than six months. The definitions of "widow" and "child" in subsections 416(c)(5) and (e)(2) deny benefits to surviving wives and stepchildren whose legal relationships to the wage earner

³ Another Supreme Court case cited in plaintiff's briefs and in *Salfi* was *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). *Murry* applied conclusive presumption analysis to invalidate a provision of the Food Stamp Act that was designed to prevent non-needy households from abusing the system. 413 U.S. 508, 511-14 (1973). However, the Supreme Court in *Salfi* cites *Murry* as authority for the proposition that "Congress may not invidiously discriminate among . . . claimants . . . on the basis of criteria which bear no rational relation to a legitimate legislative goal." 422 U.S. 749, 772 (1975). Therefore, the high Court's interpretation of *Murry* as a "rational relation" case, rather than a conclusive presumption case, made it unnecessary to distinguish the Court's application of the more stringent standard in *Murry*.

⁴ *Salfi v. Weinberger*, 373 F. Supp. 961, 965 (N.D. Cal. 1974).

were in existence for less than nine months.⁵ Having been administratively denied benefits, the widow and her daughter filed an action in the district court challenging the constitutionality of Section 416. Declaratory and injunctive relief were awarded the widow and child after the three-judge district court found the duration-of-relationship irrebuttable presumption violated the due process clause of the Fifth Amendment.⁶

On appeal, the Supreme Court reversed.⁷ The Court first rejected conclusive presumption analysis and held that only one constitutional claim was available to the *Salfi* plaintiffs.⁸ It was the Court's opinion that plaintiffs' only assertable claim was that the eligibility requirement was "not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test."⁹ The majority found that the duration-of-relationship requirement was valid since it was rationally related to a legitimate legislative objective.¹⁰

In finding the challenged legislation in *Salfi* subject only to a minimal scrutiny equal protection test instead of an irrebuttable presumption test, the high Court has substantially

⁵ Social Security Act, 42 U.S.C. §§ 416(c), (e) (1970).

⁶ 373 F. Supp. 961, 965-66 (N.D. Cal. 1974).

⁷ 422 U.S. at 785.

⁸ *Id.* at 771-72.

⁹ *Id.* at 771.

¹⁰ The Supreme Court held that this requirement was a rationally based prophylactic rule in that it tended to insulate the system from abuse. *Id.* at 777.

restricted the irrebuttable presumption doctrine's application. This intent to limit the doctrine and the extent of the limitation is evident from the Court's characterization of the previous irrebuttable presumption cases.¹¹ It appears that in limiting the recent irrebuttable presumption holdings to cases involving strict scrutiny, the Supreme Court has limited the irrebuttable presumption doctrine to those cases involving suspect classifications of fundamental rights.¹²

In light of the foregoing, it appears to the Court that the "harm" experienced by plaintiffs in not being eligible for consideration for appointment to the Board is not fundamental or substantial enough to trigger irrebuttable presumption analysis. Plaintiffs are not members of a suspect class nor, as we shall see, are fundamental rights involved. Hence, analysis of the challenged statute will be restricted to the equal protection clause's lower tier minimal scrutiny standard, which demands that the classification be a rational means of advancing some legitimate purpose. This standard is easily met, and the Supreme Court has almost universally denied equal protection challenges based on lack of rationality.

¹¹ In distinguishing the three cases relied on by the district court, the Supreme Court characterized *Stanley* and *La Fleur* as involving "fundamental rights" requiring heightened scrutiny; *Vlandis* was distinguished on its facts. *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975).

¹² It is interesting to note that the irrebuttable presumption approach had also been specifically rejected in other Supreme Court cases prior to *Salfi*. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973); *Marshall v. United States*, 414 U.S. 417 (1974); *Sosna v. Iowa*, 419 U.S. 393 (1975). The statutes and regulations involved in these prior cases merely infringed upon the individuals' interests rather than depriving them of their rights and, hence, the irrebuttable presumption doctrine was not applied.

II

The plaintiffs argue that Section 54-375 of the Virginia Code, by flatly excluding all non-optometrists from eligibility for appointment to the Board, denies plaintiffs the equal protection of the laws. In so doing, they argue that the Court should apply the more rigorous "strict scrutiny" test, in that the right to seek public office is a form of political expression and, therefore, a fundamental interest protected by the First Amendment. In support of this argument, plaintiffs direct the Court's attention to *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973). There the Circuit court held that the interest of the individual in running for public office is an interest protected by the First Amendment so that any law which significantly infringes that interest must be given strict review. As the case at bar does not involve running for public office but instead eligibility for appointment to a State Board, the Court does not agree that a fundamental interest is involved. Thus, strict scrutiny is not triggered.

In applying the minimal rationality test, the Court finds a rational relationship between the challenged statute and a legitimate governmental interest. The Court recognizes plaintiffs' contention that a number of States which permit or require their Boards to include lay members have claimed notable success. Lay members of professional boards allegedly perform their duties with great competence and they are said to make important contributions to the decision-making processes. However, the Court is equally aware that even though one State's practices are in fact successful, this in itself does not impose a constitutional duty on another State.

In the instant case, there is no evidence that the challenged statute has resulted in the appointment of incompetent,

biased or corrupt Board members. The Commonwealth has a legitimate governmental interest in the regulation of optometrists and, in furtherance of this interest, has chosen to exclude non-optometrists from the Board. Whether this policy is as successful as that employed by other States is not at issue here. What is at issue is whether there is a rational basis for this policy and, as previously stated, the Court holds in the affirmative. A law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct that evil. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

III

The plaintiffs argue that the challenged statute, by limiting eligibility for appointment to the Board to licensed optometrists, deprives plaintiffs of their right to seek public office and thereby to participate directly in their government. Consequently, they contend they have been denied their First Amendment rights¹³ as guaranteed by the Fourteenth Amendment.

As the plaintiffs point out, the First Circuit Court of Appeals has articulated a First Amendment right to run for public office as discussed previously;¹⁴ however, the

¹³ "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

¹⁴ *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973).

Court is not aware of and plaintiffs do not cite any authority for, the proposition that there is a First Amendment right to be considered for appointment to a public office. Such a right is so fleeting and ephemeral as to be, as a practical matter, unenforceable. A right which cannot be enforced is a theory – not a law. Accordingly, the Court finds no deprivation of plaintiffs' First Amendment rights to participate in their government.

IV

Although plaintiffs did not raise the issue of economic regulation in their due process argument, the Court notes that State laws regulatory of business and industrial conditions may not be struck down as violating the due process clause of the Fourteenth Amendment merely because such laws are unwise, imprudent, or out of harmony with a particular school of thought. *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955).

In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Supreme Court sustained the constitutionality of a State law prohibiting persons other than lawyers from engaging in the business of debt adjusting and debt pooling. The majority concluded that a State legislature is free to decide for itself whether legislation is needed to deal with the business of debt adjusting. Recognizing that there were arguments showing that the non-lawyer business of debt adjusting has social utility, the Court concluded that such arguments are properly addressed to the legislature and not to the Court. The majority refused to sit as a "superlegislature to weigh the wisdom of legislation," and emphatically refused to go back to the substantive due process days when courts used the Due Process Clause to strike down State laws regulatory of business and industrial conditions because they may

be unwise or out of harmony with a particular school of thought. 372 U.S. 726, 731 (1963).

Similarly, in *North Dakota Pharmacy Bd., supra*, the Supreme Court sustained the constitutionality of a State law requiring that a majority of the stock of a corporate applicant for a permit to operate a pharmacy must be owned by registered pharmacists in good standing, actively employed in and responsible for the management and operation of the pharmacy. In holding the challenged statute not to be violative of the Due Process Clause of the Fourteenth Amendment, the majority reasoned that the State was well within its authority to legislate against what it found to be injurious practices in its internal commercial and business affairs. Accordingly, the Court refused to substitute its own judgment for what the State required as reasonably necessary to protect the interests of the public. 414 U.S. 156, 165 (1973).

Nor will State laws regulatory of business and industrial conditions be struck down as violating the Equal Protection Clause of the Fourteenth Amendment so long as strict scrutiny is not triggered and the minimal rationality test is satisfied. *New Orleans v. Dukes*, 44 U.S.L.W. 5074 (U.S. June 25, 1976).

In *Dukes*, the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause was not violated by a New Orleans ordinance barring the selling of foodstuffs from pushcarts in the French Quarter, the grandfather clause of which allowed vendors who had been in operation for at least eight years to continue selling. It was the appellant City's argument that the challenged ordinance including the grandfather provision, was solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New

Orleans. Agreeing with this contention, the Court pointed out that when local economic regulation is challenged solely as violative of the Equal Protection Clause, the Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.

Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be rationally related to a legitimate State interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. 44 U.S.L.W. 5074, 5076 (U.S. June 25, 1976).

The case at bar presents an analogous situation in that the challenged statute is directly involved with economic regulation of a business, *i.e.*, optometry. The Court holds, in light of the aforementioned decisions, the challenged statute has not denied plaintiffs any due process or equal protection rights. The Court will find for defendants on the merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

| | | |
|----------------------------------|---|----------------------|
| LYNN JORDAN, <i>et al.</i> , |) | FILED |
| |) | DEC. 3, 1976 |
| Plaintiffs, |) | RECEIVED |
| |) | DEC. 1, 1976 |
| |) | CLERK, |
| |) | U.S. DISTRICT COURT |
| |) | ALEXANDRIA, VIRGINIA |
| v. |) | Civil Action |
| |) | No. 76-382-A |
| |) | |
| |) | |
| MILLS E. GODWIN, <i>et al.</i> , |) | |
| Defendants. |) | |

NOTICE OF APPEAL

Plaintiffs Lynn Jordan and Gerald W. Hyland hereby give notice that they are appealing to the Supreme Court of the United States from the final judgment entered against them by this Court on September 8, 1976. Said appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Peter H. Schuck
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(Associate counsel pursuant
to Local Rule 7)
Attorneys for Plaintiffs

Dated: December __, 1976

[Clerk's Certification]

By Betty McFadden
Deputy Clerk

In The
Supreme Court of the United States
October Term, 1976

No. 76-923

LYNN JORDAN AND GERALD HYLAND,
Appellants,

v.

MILLS E. GODWIN, JR., GOVERNOR OF THE
COMMONWEALTH OF VIRGINIA, *et al.,*
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

MOTION TO DISMISS, OR ALTERNATIVELY,
MOTION FOR SUMMARY AFFIRMANCE

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In The
Supreme Court of the United States
October Term, 1976

No. 76-923

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MOTION TO DISMISS, OR ALTERNATIVELY,
MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Rule 16(a) of this Court, the appeal should be dismissed since it was not taken within the time period set forth in 28 U.S.C. § 2101(b).

Alternatively, the judgment of the three-judge court should be summarily affirmed pursuant to Rule 16(c) of this Court on the ground that the question on which the appeal depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court denying summary judgment for plaintiffs (appellants) and finding for defendant on the merits is set forth in the Appendix to Appellants' Jurisdictional Statement (hereinafter "App.>").

JURISDICTION

The Court's jurisdiction has not been established. A three-judge court was convened pursuant to 28 U.S.C. § 2281. Judgment, with an opinion on the merits, in favor of appellees was entered on September 8, 1976. Pursuant to 28 U.S.C. § 2101(b) appellants had until November 8, 1976 (sixty days from entry of the judgment), to note their appeal. A notice of appeal was not filed until December 3, 1976.

STATUTE INVOLVED

The statute challenged by appellants is § 54-375, *Va. Code* (Repl. Vol. 1974) which is set forth in Appellants' Brief at 3.

QUESTION PRESENTED

The question presented is:

Do appellants, who are not licensed optometrists, have a First or Fourteenth Amendment right to appointment to a State Board of Optometry, which is limited by State statute to optometrists who are duly licensed State residents and have been engaged in optometry for at least five years prior to appointment?

STATEMENT OF THE CASE

The relevant facts and statement of the case are set forth in the District Court's opinion. App. 1a-12a.

ARGUMENT

I.

The Appeal Should Be Dismissed For Failure To File A Notice Of Appeal Within Sixty Days As Provided By 28 U.S.C. § 2101(b).

Jurisdiction of this Court has not been established. On September 8, 1976, the three-judge court entered an order, with an accompanying opinion, denying plaintiffs' motion for summary judgment and finding for defendants on the merits. On December 1, 1976, appellants requested leave of the District Court to file a notice of appeal after the running of the sixty-day period provided in 28 U.S.C. § 2101(b). Leave to file the appeal was improperly granted. App. 13a.

The District Court has no power to waive the statutory period in which a notice of appeal must be filed. A direct appeal to this Court from a final decision rendered by a three-judge court under 28 U.S.C. § 1253 must be taken within sixty days. 28 U.S.C. § 2101(b). *Cf.* Rule 4(a), Federal Rules of Appellate Procedure, which provides that the notice of appeal shall be filed within thirty days from the date of entry of a final order and that an additional thirty days may be permitted for "excusable neglect"; the maximum possible period for a notice of appeal being sixty days.

Section 2101 does not permit the untimely filing of appeals. Accordingly, the District Court erroneously granted leave to file the notice of appeal, and the appeal should be dismissed.

II.

The District Court's Order Should Be Summarily Affirmed Since No Substantial Question Requiring Additional Argument Is Necessary.

Judge Warriner for the District Court accurately summarized this case by declaring:

"The Court is not aware of and plaintiffs do not cite any authority for, the proposition that there is a First Amendment right to be considered for appointment to a public office. Such a right is so fleeting and ephemeral as to be, as a practical matter, unenforceable." App. at 10a.

Turner v. Fouche, 396 U.S. 346 (1970), upon which appellants heavily rely in their Jurisdictional Statement, is inapposite to this appeal. Appellants fail to distinguish cases involving suspect classes and invidious discrimination, such as *Turner v. Fouche*, *supra* from the instant case. *Turner* involved a classic case of freehold requirements being used to discriminate against Black participation on a School Board.

Appellants are not, however, members of a suspect class nor are fundamental rights involved. While there may be a right to run for public office which requires strict scrutiny, *Dunn v. Blumstein*, 405 U.S. 330 (1972), there is no fundamental right to be appointed to public office.

Where neither a suspect class nor a fundamental right is involved, the proper test for the constitutionality of a state statute is whether the statutory requirement is rationally related to a legitimate legislative objective. *Weinberger v. Salfi*, 422 U.S. 749 (1975). The District Court properly applied that test in this case.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed; alternatively, the Court should affirm.

Respectfully submitted,

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Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss, Or Alternatively, Motion for Summary Affirmance were mailed, postage prepaid, to Peter H. Schuck, Esquire, 1714 Massachusetts Avenue, N.W., Washington, D. C. 20036, this 26th day of January, 1977.

JOHN HARDIN YOUNG
Assistant Attorney General

Supreme Court, U. S.

FILED

FEB 3 1977

MICHAEL RODAK JR. CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-923

LYNN JORDAN and GERALD HYLAND,

Appellants,

v.

MILLS E. GODWIN, Governor of the
Commonwealth of Virginia, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

**APPELLANTS' REPLY TO MOTION TO DISMISS OR
ALTERNATIVELY, FOR SUMMARY AFFIRMANCE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

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LYNN JORDAN and GERALD HYLAND,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

**APPELLANTS' REPLY TO MOTION TO DISMISS OR
ALTERNATIVELY, FOR SUMMARY AFFIRMANCE**

Appellees' motion to dismiss or alternatively, for summary affirmance is incorrect on both asserted grounds:

1. Rule 11(3) of the Rules of this Court requires that the notice of appeal be filed "within the time allowed by law for taking such appeal". Under 28 U.S.C. § 2101(b), the time allowed for this appeal was 60 days from the date of judgment, or by November 8, 1976. Rule 4(a), F.R.A.P. provides that the district court may grant a 30-day extension "[u]pon a showing of excusable neglect". By order

dated December 3, 1976, the district court found that such a showing had been made—counsel, through no fault of his own, had only learned of the decision on November 30—and granted an extension until December 8. The notice of appeal was filed December 3.

Appellees cite no authority or justification for the proposition that the district court's power to grant the 30-day extension applies when the appeal is to the Court of Appeals but not when the appeal is directly to the Supreme Court. Several decisions of this Court, however, suggest by analogy that the power exists in a direct appeal situation as well. See, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, No. 74-895 (by not granting appellee's motion to dismiss, Court implied that the provisions in the Federal Rules tolling the time for filing notice of appeal applied in a direct appeal to this Court); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944) (timely motion to amend findings would toll the period for taking an appeal, where no tolling was specified in the review provisions); *United States v. Healy*, 376 U.S. 75 (1964) (timely petition for rehearing tolled the time for applying to the Supreme Court for certiorari in a criminal case, even though no rule specifically provided for such tolling).

2. Appellees' characterization of *Turner v. Fouche*, 396 U.S. 346 (1970), which they now address for the first time in this entire litigation (see, *Juris. St.* at 12), is wholly false. In *Turner*, this Court struck down the freeholder requirement for appointment to the school board *not* because it had been used to exclude blacks,¹ but *solely* because it

¹ As Part I of this Court's opinion in *Turner* makes clear, the allegations concerning exclusion of blacks related to *other* practices also challenged by plaintiffs in that case. *Id.* at 350 ("The complaint attacked those provisions as accounting for both the exclusion of Negroes and nonfreeholders from the board of education".)

flatly excluded *all* nonfreeholders, white or black. Indeed, the Court's opinion in *Turner* does not even mention any racial effects of the freeholder requirement. See, *id.* at 362-64.

Finally, appellants do *not* assert a right "to be appointed to public office", as appellees state (Motion to Dismiss at 4), but only the right, recognized by this Court, "to be considered for public service without the burden of invidiously discriminatory disqualifications [citation omitted]". 396 U.S. at 362. Whether this right is "fundamental" or not is the question which this Court expressly reserved in *Turner v. Fouche*. See, *Juris. St.* at 13-15.

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